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No. 94-462

In the Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF GRAPEVINE, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

PETER R. STEENLAND, JR.
ALBERT M. FERLO, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that the Federal Aviation Administration properly approved the proposed expansion of the Dallas/Fort Worth International Airport.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Vieux Carre Property Owners, Residents & Assocs., Inc. v. *Brown*, 948 F.2d 1436 (5th Cir. 1991)	7, 9
Yerger v. *Robertson*, 981 F.2d 460 (9th Cir. 1992)	9

Statutes and regulations:

Department of Transportation Act, § 4(f), 49 U.S.C. 1653(f) (1976) (repealed), recodified at 49 U.S.C. 303(c)	5
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*:	
§ 102(2)(C), 42 U.S.C. 4332(2)(C)	3, 5
National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*:	
§ 106, 16 U.S.C. 470f	4, 5, 7, 8, 9
36 C.F.R.:	
Section 800.1(a)	9
Section 800.3(b)	9
Section 800.3(c)	9
40 C.F.R:	
Section 1500.4(p)	5
Section 1508.4	6

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OPINION BELOW

The opinion of the court of appeals denying the petition for review (Pet. App. A1-A15) is reported at 17 F.3d 1502.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1993 (Pet. App. A17). The opinion of the court of appeals was issued on March 18, 1994 (Pet. App. A1-A15). A petition for rehearing was denied on May 9, 1994 (Pet. App. A16). On July 15, 1994, Chief Justice Rehnquist entered an order extending the time within which to file a petition for a writ of certiorari to and including September 6, 1994. The petition for a writ of

certiorari was filed on September 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This case arises out of a proposal to add two runways to the Dallas/Fort Worth International Airport (DFW or the airport) to accommodate growing demands on the airport. DFW is the world's second busiest airport, next to Chicago's O'Hare Airport. In 1974, its first year, DFW's three runways handled more than 330,000 aircraft operations (a takeoff or a landing) and accommodated more than 6.8 million passengers. As demand increased and as conditions in the airline industry changed after deregulation, DFW added three runways that had been part of its original design. By 1990, DFW handled more than 730,000 aircraft operations and accommodated more than 24 million passengers. FEIS Vol. I, at 98.[1]

In 1988, DFW issued a new airport development plan to ensure that it would be able to meet growing demand. FEIS Vol. I, at 95. The plan projected that, by the year 2010, the airport would handle more than 1.2 million aircraft operations and that more than 52 million passengers would use the airport each year. *Id.* at 99, 100.[2] DFW concluded that, absent physical expansion, the growth in the number of aircraft operations and passengers would increase departure delays from the current 4.2 minutes per operation to an unacceptable 23.6 minutes per operation in the year 2010. *Id.* at 111. The

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[1] "FEIS" refers to the final environmental impact statement of the Federal Aviation Administration. The FEIS is found at Volumes 70 and 71 of the administrative record.

[2] That estimate was confirmed by the Federal Aviation Administration's independent forecast of DFW's demand. FEIS Vol. I, at 101.

airport also estimated that the annual cost of such delay would exceed $660 million in 2010. *Ibid.*

To accommodate such growth while avoiding such delays, DFW's plan envisioned

> the addition of two runways, two terminals, and more than 400 acres of parking, as well as cargo, hangar, maintenance, and other support facilities. Existing runways would also be expanded, while some terminals would be razed.

Pet. App. A3. The two new runways would be aligned parallel to the existing runways, with an East Runway to be built first, and a West Runway to follow. FEIS Vol. I, at 112.

b. DFW thereupon sought approval of the two runways from the Federal Aviation Administration (FAA). The FAA, pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), prepared an environmental impact statement (EIS) evaluating the proposal. The EIS described the proposed federal action as the

> Federal approval and funding participation in the construction of proposed new Runway 16/34 East, scheduled to be operational in 1992, and proposed new Runway 16/34 West, scheduled to be operational in 1997, and the runway-related improvements and safety actions associated with their operation at the * * * Airport.

FEIS Vol. I, at 77. The EIS noted (*ibid.*) that related "improvements" and "safety actions" that DFW had proposed included

> taxiways; aprons; runway protection zones (formerly called clear zones); navigational aids; lighting systems; drainage improvements; surface road

modifications; property acquisition; mitigation measures; and airspace actions below 3,000 feet above ground level.

After holding public hearings and considering comments from the public and from state and federal agencies, the FAA issued its final EIS (FEIS) in December 1991. The FEIS—a 2,034-page document with 25 appendices of supporting studies and data—discussed in detail the environmental impacts of construction and operation of the two runways. It considered the impact of DFW's plan on noise, air, and water pollution, wetlands and parklands. The FEIS also noted that although it was not obliged to consider the environmental impact of certain individual dimensions of the overall plan based upon FAA regulations authorizing categorical exclusions from such impact statements, the FEIS had evaluated the potential cumulative impacts of the categorically excluded items. FEIS Vol. I, at 121-124. The FEIS also discussed extensively the potential impact on historic and archaeological resources of the runway project. *Id.* at 734; FEIS Vol. II, App. 22, at 986-1123.

2. On April 6, 1992, the FAA issued a Record of Decision (ROD) approving the two new runways. The agency approved the East Runway for both funding and construction. Pet. App. A36. That runway is currently under construction and is scheduled to become operational in 1997. But the FAA limited its approval of the West Runway to allowing the airport to depict that runway on its new airport layout plan, and to a finding that the West Runway was eligible for future funding. Until the consultation process required by Section 106 of the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470f, was complete, the FAA ruled, DFW could not begin any construction on the West

Runway, including construction which did not use federal funds. Pet. App. A37-A38. The FAA also stated that its approval of the West Runway was subject to reevaluation after completion of the NHPA consultation process. *Id.* at A41.

3. Petitioner[3] thereupon filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the FAA's action. Petitioner claimed that in granting conditional approval of the West Runway, the FAA had violated Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), Section 4(f) of the Department of Transportation Act, 49 U.S.C. 1653(f) (1976) (repealed), recodified at 49 U.S.C. 303(c), and Section 106 of the NHPA, 16 U.S.C. 470f.

The court of appeals rejected petitioner's claims. Pet. App. A1-A15. The court first held that the FAA had complied with NEPA by taking a hard look at the environmental consequences of the proposed action. Petitioner had alleged that the FAA had improperly excluded from environmental review portions of the airport's development plan through the use of categorical exclusions.[4] But the court noted that the use of such

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[3] Petitioner was joined in the court of appeals by the City of Irving, the City of Euless, the Irving Independent School District and several independent landowners.

[4] The Council on Environmental Quality (CEQ) regulations provide that federal agencies "shall reduce excessive paperwork by * * * [u]sing categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement ([40 C.F.R.] § 1508.4)." 40 C.F.R. 1500.4(p). The CEQ regulations define categorical exclusions as

> a category of actions * * * which have been found to have no [significant] effect [on the human environment] in procedures adopted by a Federal agency in implementation of these

exclusions had been authorized by Council on Environmental Quality (CEQ) regulations implementing NEPA, and that the FAA had properly applied its own regulations authorizing such exclusions. Petitioner's claim that the FAA had acted improperly, the court stated, "would negate altogether the possibility of excluding any individual element under [the regulations]." *Id.* at A7.

The court also rejected petitioner's claim that the FAA had not adequately considered the cumulative impacts of the runway expansion project. Pet. App. A7-A8. Petitioner had criticized the FAA for not considering individual elements of the project that it deemed "independent" or "speculative." But, the court noted, the FAA had considered some of these elements. Moreover, the FAA had expressly stated that the facilities depicted on the new airport layout plan could not be built without "further review and analysis by the FAA" and therefore that "any environmental impact slighted in the FEIS will be the subject of further consideration." *Id.* at A7. To the extent that the FAA had not considered the impact of specific dimensions of the airport plan because it found those elements too speculative to review at this point, the court stated, then the FAA must conduct a

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> regulations ([40 C.F.R.] § 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments * * * even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

40 C.F.R. 1508.4. As required by the CEQ regulations, the FAA has established its own list of categorical exclusions. See Pet. App. A28. Included in that list are runway extensions, new passenger terminals and installation of various airfield lighting systems.

separate environmental review of that element "when the matter is no longer too speculative to warrant it." *Id.* at A8.

Finally, the court of appeals held that the FAA had not violated Section 106 of the NHPA by conditionally approving the West Runway. The court noted that "[m]erely by issuing its Decision the FAA did not 'approv[e] the expenditure of any Federal funds' for the runway." Pet. App. A14 (quoting 16 U.S.C. 470f). Rather, the FAA had held that no construction could commence until the FAA had completed the review and consultation required by Section 106. Pet. App. A14-A15.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Furthermore, the decision below turns on the particular circumstances of this case and presents no question of general importance meriting review by this Court.

1. Petitioner first alleges (Pet. 9-14) that the court of appeals misapplied Section 106 of the NHPA and that its decision conflicts with the decision of the Fifth Circuit in *Vieux Carre Property Owners, Residents & Assocs., Inc.* v. *Brown*, 948 F.2d 1436 (1991). Specifically, petitioner claims that the FAA, by conditionally finding the West Runway eligible for federal funding and by approving the proposed location of the runway, has "reduced the Section 106 review to an exercise in futility." Pet. 13.

Petitioner's claim is without merit. As the court of appeals recognized (Pet. App. A14), Section 106 of the NHPA prohibits a federal agency from approving the expenditure of federal funds or granting a federal license for a project without taking into account "the effect of

the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. 470f. But the court quite properly found no violation of that statute because the FAA's approval of the West Runway was conditioned upon the satisfactory completion of the Section 106 review process. Pet. App. A14. Thus, the court noted that the FAA, "[m]erely by issuing its Decision" that the runway plan was eligible for federal funding, "did not 'approv[e] the expenditure of any Federal funds' for the runway." *Ibid.* (quoting 16 U.S.C. 470f). And without the expenditure of federal funds, no violation of Section 106 can occur.

Equally unavailing is petitioner's claim that by approving the location of the West Runway, the FAA has rendered the Section 106 review process a futile act. The FAA expressly prohibited "commencement of construction * * * prior to the completion of the Section 106 process, even if the project should be funded without federal funds." Pet. App. A38. The court of appeals upheld that restriction and noted (*id.* at A14-A15):

> If the DFW Airport Board commits its own resources to the West Runway—for further planning, engineering, or what have you short of construction—although the runway was only conditionally approved, then it does so at the risk of losing its investment should the § 106 process later turn up a significant adverse effect and the FAA withdraw its approval.

Contrary to petitioner's assertion, the prohibition on any construction prior to completion of the Section 106 review process ensures that that review process will retain vitality and meaning.

The FAA's conditional approval of the runway expansion plan also fully comports with the regulations

issued by the Advisory Council on Historic Preservation. See 36 C.F.R. 800.3(b) (procedures "may be implemented * * * in a flexible manner reflecting differing program requirements, so long as the purposes of section 106 review under the [NHPA] and these regulations are met"); 36 C.F.R. 800.3(c) (Section 106 requires completion of review process prior to approval of expenditure of federal funds, but does not bar "authorizing nondestructive planning activities preparatory to an undertaking before complying with section 106, or * * * phased compliance at different stages in planning"); see also *Yerger* v. *Robertson*, 981 F.2d 460, 465 (9th Cir. 1992) (order to remove historic buildings that was made contingent on completion of Section 106 consultation process "comports with the requirements of the [NHPA]"). As contemplated by these regulations, the Advisory Council will have "a reasonable opportunity to comment" with regard to the project, 36 C.F.R. 800.1(a), and not until the Section 106 consultation process is complete may construction begin.

The decision of the Fifth Circuit in *Vieux Carre Property Owners, Residents & Assocs, Inc.* v. *Brown*, *supra*, is not at all to the contrary. In that case, the Fifth Circuit merely restated the provisions of the NHPA that require all federal agencies to give the Advisory Council an opportunity to comment on a project's potential effect on historic structures before granting a final license for the project. The court rejected a lower court finding that to allow historic review of a park project after its virtual completion would unfairly penalize private developers. 948 F.2d at 1445. The court remanded the case to determine if in fact a federal license existed that was subject to the requirements of Section 106. *Id.* at 1445, 1448-1449. By

contrast, the court below expressly conditioned both expenditure of federal funds and actual construction on further review under the NHPA, and cautioned DFW that any non-construction expenditures that it chose to make were at risk of loss "should the § 106 process later turn up a significant adverse effect and the FAA withdraw its approval." Pet. App. A14-A15. Thus, far from being inconsistent with each other, the decisions of the court below and the Fifth Circuit both properly gave precedence to the requirements of the NHPA over the financial interests of developers.

2. Petitioner also argues (Pet. 15-18) that the court of appeals erred in holding that the FAA did not impermissibly "segment" its review under NEPA of the proposed airport project. In a related argument, petitioner claims (Pet. 18-21) that the court of appeals erred in approving the FAA's use of categorical exclusions. These arguments both mistakenly assume that the proposal conditionally approved by the FAA was the airport's entire development plan. But the court of appeals rejected that premise. It recognized that the proposal under review by the agency was limited to the construction and operation of two new runways and related facilities. Pet. App. A4; see also *id.* at A36 (ROD states that project under review is construction and operation of two new runways). There is no basis for assuming that other projects that are also part of the airport's overall development plan will receive anything short of the appropriate review under NEPA when those projects are sufficiently concrete for the FAA to proceed with such review. Indeed, the court of appeals required that, to the extent the FAA's review of particular elements had been premature when it was considering the runway plan, "then such review must be done when

the matter is no longer too speculative to warrant it." *Id.* at A8.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

PETER R. STEENLAND, JR.
ALBERT M. FERLO, JR.
Attorneys

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[5] In criticizing the FAA's use of categorical exclusions, petitioner fails to address the reasoning of the court of appeals. Having noted that the CEQ authorizes agencies such as the FAA to utilize such exclusions, the court proceeded to analyze the exclusions in this case in light of the FAA's stated policy regarding such exclusions, as encapsulated in an earlier order. The court found the exclusions in this case fully consistent with the terms of that order. Pet. App. A4-A8. Petitioner, while decrying the effect of such exclusions, fails to explain why the court of appeals erred in finding them permissible in this case. Nor does petitioner cite any authority precluding use of such exclusions under the circumstances presented here.